Supreme Court, U.S.
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No. 00-248

IN THE

Supreme Court of the United States

WESTLY WEST, *et al.*,

Petitioners,

v.

NICK A. CONGEMI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a civil service employee legally engage in political activity which he agrees would be illegal under Louisiana's Constitution and Little Hatch Act, merely by associating with one or more other persons to do the exact same act? In other words, may two or more civil service employees accomplish together that which they could not do if acting alone?

PARTIES TO THE PROCEEDING BELOW

The Petition includes an interloper. The only proper Petitioners are those five individual employees who were terminated from their civil service employment by the City of Kenner Police Department. The so-called "Police Association City of Kenner" (PACK), if it exists at all, was never a proper party before the district court, or before the appellate court. These points will be explained in more detail later herein. For now, please see footnote 1 to the decision of the appellate court.

The Respondents are the City of Kenner and Chief of Police Nick Congemi. Kenner was the employer of the five former employee Petitioners. Chief of Police Nick Congemi (an elected official) is the individual official who terminated the five Petitioners' employment.

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CITATIONS TO OPINIONS BELOW

The decision of the district court is published at *West v. Congemi*, 28 F. Supp. 2d 385 (E.D. La. 1998), *affirmed*, 211 F.3d 593 (5th Cir. 2000). A copy of the district court's decision, as well as the unpublished decision of the United States Fifth Circuit Court of Appeals, may be found as Appendix F and G, respectively, attached to the Petition for Certiorari.

In addition, and for the purpose of respecting the intent behind this Court's Rule 15.2, Respondents respectfully apprise this Honorable Court of two additional rulings involving this matter:

First, on June 24, 1999, the City of Kenner Municipal Fire and Police Civil Service Board ruled after a lengthy hearing on the merits that Chief Congemi's decision to terminate the five employees was made in good faith and for cause. (Attachment 1) The Board also specifically ruled that the contribution was made to City Council candidate Joseph Stagni without any prior knowledge of the PACK membership. *Id.* However, because the Board perceived an ambiguity between La.R.S. §§ 33:2504 and 2507, it ordered that the employees were to be reinstated after all proceedings and appellate review were completed. *Id.*

Second, on February 29, 2000, the Louisiana Twenty-Fourth Judicial District Court (to which appeals of Civil Service Board rulings are properly lodged) ruled as follows: (a) the Board's factual determination that Chief Congemi acted in good faith and for cause was affirmed, and (b) the legal determination of reinstatement based upon a perceived ambiguity in the statutes was reversed, upon a determination of law that there is no conflict or ambiguity between the two state statutes. (Attachment 2)

At the time of the filing of this Opposition Memorandum, the Louisiana Court of Appeal for the Fifth Circuit is currently considering the employees' appeal of the said state district court

ruling. Oral argument of that appeal was conducted before the state appellate court just days ago, on October 5, 2000. While undersigned counsel cannot predict exactly when the ruling will be announced, he can apprise this Honorable Court that in most circumstances, decisions are rendered by the state appellate court within 30 to 60 days of oral argument. Thereafter, the filing of a writ to the Louisiana Supreme Court is highly likely.

BASIS FOR JURISDICTION

Respondents offer no argument against the jurisdictional claims made as to the five terminated employees. However, Respondents fail to see how the Police Association City of Kenner, again if it exists, is properly a Petitioner to this Court. The procedural circumstances attendant to this problem will be noted in the discussion of the Statement of the Case.

CONSTITUTIONAL PROVISIONS, TREATIES, ETC. INVOLVED

This section of the Petition contains a very serious omission. Louisiana's "Little Hatch Act" is not *just* statutory. Its entire text, while repeated at La.R.S. 33:2504, is also included in its entirety within Louisiana's Constitution. Accordingly, any interpretation of La.R.S. 33:2504 is likewise an interpretation of Louisiana's Constitution. In that regard, Louisiana's Constitution of 1974 at Article 10, Section 20, reads as follows:

> Section 20. **Political Activities**
>
> Section 20. Article XIV, Section 15.1, paragraph 34 of the Constitution of 1921 is retained and continued in force and effect.

The referenced paragraph from the Louisiana Constitution of 1921 reads as follows:

> **34. Political Activities Prohibited**. a. Political activities by and extending to employees of the classified service are hereby prohibited as follows:

(1) No person shall seek or attempt to use any political endorsement in connection with any appointment to a position in the classified service.

(2) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration.

(3) **No employee in the classified service shall, directly or indirectly, pay, or promise to pay any assessment, subscription, or contribution for any political organization or purpose, or solicit or take part in soliciting any such assessment, subscription, or contribution.** No person shall solicit any such assessment, subscription or contribution of any employee in classified service. The prohibitions of this Subsection shall not be construed as applying to membership dues paid, or contributions made, to non-political employee organizations, pension funds, civic enterprises, the Louisiana Civil Service League or any similar non-political and non-partisan organization.

(4) **No employee in the classified service shall** (a) be a member of any national, state, or local committee of a political party, (b) be an officer or member of a committee of any factional, political club or organization, (c) be a candidate for nomination or election to public office, (d) make any political speech or public political statement in

behalf of any candidate seeking to be elected to public office, or (e) **take any part in the management or affairs of any political party or in the political campaign of any candidate for public office, except to privately express his opinion and to cast his vote.**

(5) No person elected to public office shall, while serving in the elective office, be appointed to or hold any position in the classified service.

(6) No appointing authority, or agent or deputy thereof, shall directly or indirectly, demote, suspend, discharge, or otherwise discipline, or threaten to demote, suspend, discharge or otherwise discipline, or discriminate against any person in the classified service for the purpose of influencing his vote, support, or other political activity in any election or primary election. No appointing authority, or agent, or deputy thereof, shall use his official authority or influence, by threats, promises or other means, directly or indirectly, to coerce the political action of any employee in the classified service.

b. **The appointing authority shall discharge from the service any employee whom he deems guilty of violating any one or more of the provisions of this Section.** The board may, upon its own initiative, investigate any officer or employee in the classified service whom it reasonably believes guilty of violating any one or more of the provisions of this Section. The board shall, within thirty days after receiving the written charges, hold a public hearing and investigation and determine whether such charges are true and correct. If the board should find upon its investigation of any employee that he has violated any of the foregoing provisions, the board shall order the appointing authority to

> forthwith discharge the guilty employee from the service and the appointing authority shall forthwith discharge the employee.
>
> c. Whoever violates this Section shall be subject to the penalties provided in paragraph 37. In addition any employee in the classified service who is discharged because of violating a foregoing provision shall not again be eligible for employment or public office in the classified service for a period of six years from the time of his discharge. (emphasis added)

In addition, the Petitioners have also failed to inform this Honorable Court that all of their federal claims were predicated upon 42 U.S.C. § 1983. That statute reads as follows:

> § 1983. Civil Action for Deprivation of Rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The following is a chronology of the material events out of which the Petition for Certiorari arises. The chronology will first set forth the events leading to the employees' termination. Next the chronology will set forth the procedural events of the ensuing litigation including the circumstances which bear upon the question of whether "PACK" is properly a Petitioner to this Honorable Court:

1) The former employees, Messrs. West, Lynch, Polito, Jaume & Verrette were each members of the Classified Civil Service of the City of Kenner Police Department. Civil Service in Kenner is governed by Part II of Louisiana's civil service law, that being La. R.S. 33:2471 *et seq*. Accordingly, the employees' activities, at all material times herein, were subject to the prohibitions contained in La.R.S. 33:2504 and Article 10, Section 20 of Louisiana's Constitution of 1974.

2) On or about February 23, 1998, Mr. Joe Stagni, then a candidate for a seat on the Kenner City Council, sought the political support of the Executive Board of PACK in his endeavor to seek the office of Councilman At-Large for Division "A" in Kenner. (Appendix to Petition, p. 69a)

3) On or before March 3, 1998, the five employees announced to the PACK membership that they had "decided to endorse and support Mr. Stagni in his endeavor to seek political office." (Appendix to Petition, p. 71a) *Each* Petitioner signed the letter. *Id*. On the same date, the said letter was distributed to other Kenner Civil Service employees.[1] Said letter requires that

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1. As to this activity, the rules set forth in *Letter Carriers* include the following:

> 22. Newspapers — **publication of letters or articles**: A classified employee may not publish or be connected editorially or managerially with any political newspaper, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any

(Cont'd)

if any civil service employee of the Kenner Police Department wishes to "object" to this action, he or she must do so openly and publicly (a.k.a. "in writing") by a specified date. (Appendix to Petition, p. 71a)[2].

4) As is established by the letter of March 3, 1998, the decision to endorse had already been made by the individuals at issue *before* any vote by the general membership of PACK.

5) On March 9, 1998, thirteen members of PACK wrote a letter to the PACK Executive Board objecting to the manner in which the decision to endorse Mr. Stagni was made. In that letter, the thirteen PACK members state:

> We, the undersigned, have no specific objection to the endorsement of Mr. Stagni. Rather our objection is to the endorsement process itself, **or lack thereof.**
>
> As you stated in you letter announcing the Executive Board's endorsement, PACK is a "very strong and growing organization." It is conceivable that any endorsement of any candidate by PACK could help that candidate achieve election. **A decision of such importance should not rest solely in the hands of the Executive Board.** If only one member of PACK should contest the endorsement of Mr. Stagni, or any candidate, we believe that it is incumbent of the Executive Board

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(Cont'd)
political party, candidate, faction, or measure. **An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use.** (emphasis added) (See § 4 and 19) *Letter Carriers, infra*, 413 U.S. at 586 (in Appendix).

2. Thus not even the secrecy of a ballot box was respected. **Civil service was created *precisely* to avoid this type of political coercion of civil service workers.**

> to preserve the rights of that member and require a vote of the General Membership in a Special Meeting called for in the manner prescribed by the Constitution and by laws of PACK. This is the only true method of preserving the integrity of our organization and the credibility of the Executive Board. (emphasis added)

6) On March 14, 1998, the members of the executive board of PACK, speaking through their President, Mr. West, ignored the objections of the membership and unilaterally communicated their endorsement of Mr. Stagni via a letter. (Appendix to Petition, p. 79a)

7) On March 30, 1998, the PACK executive board also provided a $300 campaign **CONTRIBUTION** to the Joseph Stagni Campaign Fund. (Appendix to Petition, p. 80a) As the PACK meeting minutes for March 13, 1998 establish, *each* Petitioner voted in favor of the contribution. (Attachment to Petition, p. 78a) **There is not even a *claim* that this action was preceded by any consultation with the PACK membership!** Moreover, the Kenner Civil Service Board has specifically found that the membership had no prior knowledge of the giving of a campaign contribution. (Attachment 1)

8) Mr. Stagni did irrefutably *receive* a political endorsement from the five employees. Such was announced publicly by Mr. Stagni during the campaign, as is evidenced by the campaign materials appended to the Petition at page 81a.

9) On May 4, 1998, and acting upon advice of counsel, Chief Congemi directed his Internal Affairs Division to commence a formal investigation under normal civil service rules "towards possible disciplinary action, demotion or dismissal." In the letter announcing said investigation to the employees, they were specifically advised that they were being investigated for possible violations of "La.R.S. 33:2504." Additionally, this notification showed that all provisions of

La.R.S. 40:2531 *et seq.*, commonly known as the "police officers' bill of rights," would be fully respected.

10) On May 7, 1998, recorded statements were taken by the Kenner Police Department Internal Affairs Division from each of the named Plaintiffs. No information was obtained during any of those statement which contradicted any of the facts being set forth in this chronology. It was during these recorded statements, however, that IAD first learned of the $300 campaign **contribution**. (Counsel for the employees was present during the taking of each of these statements.)

11) On June 1, 1998, Chief Congemi provided advance written notice to each of the Petitioners that a pre-termination hearing would be conducted on Thursday, June 4, 1998. This notice was given for the specific purpose of bringing the Kenner Police Department's activities into compliance with the U.S. Fifth Circuit's holding in *Browning v. City of Odessa*, 990 F.2d 842 (5th Cir. 1993). *Browning* regards the need to conduct pre-termination hearings before public employees with property interests in their jobs are terminated.

12) On June 2, 1998, and with the obvious intent to "sidetrack"[3] the said pre-termination hearing which was specifically mandated by the U.S. Fifth Circuit, the employees sought injunctive relief and damages pursuant to 42 U.S.C. § 1983 in a lawsuit they filed in state court. Upon service of the Petition, the Defendants promptly removed the action to federal court, given that the employees' principle claim was a claim for relief under 42 U.S.C. § 1983.

13) On June 4, 1998, U.S. District Court Judge Thomas Porteous conducted a hearing in chambers concerning the question of whether a TRO would be issued. Judge Porteous declined to issue a TRO, but noted that he would reconsider the issue of a preliminary injunction *after* Chief Congemi made his final decision as to whether the employees would actually be terminated.

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3. *See Tower, infra,* 467 U.S. 914 at 923-924.

14) Later that same day, June 4, 1998, Chief Congemi did conduct the pre-termination hearing mandated by *Browning*. At this hearing, the employees provided to Chief Congemi: (1) a copy of the $300.00 contribution check, (2) a copy of the letter of endorsement, and 3) an uncertified copy of PACK's Articles of Incorporation. Beyond these documents, no additional facts were presented for Chief Congemi's consideration. Instead, the employees remained completely silent, and spoke only through their lawyer.

15) On Monday, June 15, 1998, and in compliance with the direct command of the Louisiana Legislature found at La.R.S. 33:2504B, Chief Congemi did terminate each of the five employees. For this decision by the appointing authority to be incorrect, it must be shown that *no* violation of La.R.S. 33:2504A (3) *or* (4) occurred.

16) Louisiana law has long provided a post-termination procedure which provides due process (a/k/a notice and a reasonable opportunity to be heard) regarding any claim that a termination of civil service employment was not justified. *See* La.R.S. 33:2501.

17) Within days of being terminated, each employee sought an appeal to the Kenner Civil Service Board. As noted earlier, the Civil Service Board has already *held* that Chief Congemi acted in good faith and for cause, and a district court sitting in Louisiana has held that under Louisiana state law, that given that fact finding, the only legal response is termination. (Attachments 1, 2)

In addition to the facts which are the subject *of* the litigation, Respondents ask that this Honorable Court take notice of the following chronology which regards the progress of the litigation to date. As revealed below, the individual Plaintiffs/Petitioners who claim to be the Executive Board of PACK did not seek to have PACK intervene into this litigation until after a Motion for Summary Judgment was already pending before the district judge:

6/2/98 — Petition filed

6/19/98 — Temporary Restraining Order request from Plaintiffs denied

8/14/98 — Status conference with the district judge

9/14/98 — At the said status conference of 8/14/98, this date was set with the agreement of all counsel as the deadline for the filing of Defendants' Motion for Summary Judgment. Defendants met this deadline.

9/22/98 — On this date, well after the status conference with the district judge, well after the judge had already handled injunctive proceedings, and after the deadline set for the filing of a Motion for Summary Judgment with the agreement of counsel, the same persons who claim to be the Executive Board of PACK directed the so-called organization "PACK" to intervene through a different counsel. Clearly, the only purpose of this endeavor was to cause delay.

10/16/98 — On this date, the five employees/Plaintiffs filed their own Motion for Summary Judgment. Thus, at this point, the district judge faced motions from both sides to the controversy which sought to end it in summary fashion.

10/27/98 — The district judge issued a minute entry combining the hearing date of the cross-motions for summary judgment. At the same time, he ordered that the hearing date of the Motion to Intervene filed by PACK be continued without date. Apparently, the district judge wanted to learn whether he had a case before him in the first place, before he added another party to it.

11/4/98 — Lengthy oral argument was conducted before the district judge of both sides' motions for summary judgment.

11/23/98 — The U.S. District Judge granted the Defendants' Motion for Summary Judgment, denied the Plaintiffs' Motion for Summary Judgment, and denied PACK's Motion to Intervene as moot. (Appendix to Petition at p. 11a)

6/24/99 — In wholly separate proceedings, the Kenner Municipal Fire and Police Civil Service Board ruled this date that Chief Congemi had acted in good faith and for cause when he terminated the five employees. (Attachment 1)

2/29/2000 — The Louisiana *state* district court ruled this date that the Kenner Civil Service Board fact finding that Chief Congemi acted in good faith and for cause would stand, but that the Board's legal ruling modifying the decision to terminate would be reversed. (Attachment 2)

3/21/2000 — The U.S. Fifth Circuit affirmed the decision of the U.S. District Court granting summary judgment on all of the employees' federal claims in the lawsuit out of which the Petition arises. (Appendix to Petition at p. 1a)

10/5/2000 — Oral argument was conducted before the Louisiana Court of Appeal for the Fifth Circuit concerning the employees' appeal of the state district court ruling and the Kenner Civil Service Board ruling. No ruling from the Louisiana Fifth Circuit Court of Appeal has as yet been announced.

REASONS FOR DENYING THE WRIT

1. The *Real* Argument

Perhaps the best way to understand the question presented by the Petitioners is to first consider what is *not* presented.

Critically, Petitioners are *not* contending that their actions, if done by any particular one of them acting alone, would *not* violate Louisiana's Little Hatch Act. They do not dispute that had any one of them issued the endorsement or the contribution, that Louisiana's Constitutional and statutory law would mandate their immediate termination from civil service employment.

Second, Petitioners do not argue that Louisiana's Little Hatch Act is unconstitutional. As indicated in the opinion of Judge Porteous, Petitioners stipulated at the district court level that La.R.S. 33:2504 is Constitutional under federal law.[4]

4. As noted by the District Court, "It is very important to note that the Plaintiffs do not claim that the state statute at issue is (Cont'd)

In addition, since the provision is repeated verbatim *within* Louisiana's Constitution, logically it cannot be argued that the provision *violates* the Louisiana Constitution.

Accordingly, the only argument made by these Petitioners concerns what legal consequences would flow from a decision *of more than one* civil service employee to band together to do collectively or in group, that which no particular one of them could do alone. According to your Petitioners, the Association somehow would have greater rights under the law than the rights of any of the Association's individual members.

One problem with examining this argument in this case, is that the Association itself is not a party to these proceedings. **Police Chief Nick Congemi did not terminate PACK.** In no sense was the employees' association with, or control over PACK harmed or effected in any way. Indeed, the five employees still claim to be the executive board of PACK today. Again, PACK was never a party to this case. (Please see the U.S. Fifth Circuit's opinion in this regard.)

From the perspective of Chief of Police Nick Congemi and the City of Kenner, five different civil service employees each took an active part in the election campaign of a candidate for a seat on Kenner's City Council. Each of these five employees actively participated in providing an endorsement to that candidate, and each actively participated in the giving of a contribution. Note that the irrefutable evidence establishing these facts is attached in the Appendix to the Petition for Writ of Certiorari. At page 71a of the Petitioners' Appendix, please see where the five employees state and communicate in writing that they "have decided to endorse and support Mr. Stagni in his endeavor to seek political office." Next, please see page 78a of their Appendix wherein each of the five employees voted "5-0" to provide a campaign contribution to their candidate.

(Cont'd)
unconstitutional, but claim that Chief Congemi erroneously enforced it." *West, supra*, 28 F. Supp.2d at 389.

Finally, please see page 80a of their Appendix, that being a copy of the check they provided to the "Joseph Stagni Campaign Fund." It was this active and direct participation in the campaign of Joseph Stagni which violated Louisiana's statutory and constitutional law.

From the perspective of the Respondents, this Honorable Court's decisions in *Broadrick v. Oklahoma*, 409 U.S. 1958 (1972) and *U.S. Civil Service Commission v. National Assoc. of Letter Carriers*, 413 U.S. 548 (1972) directly answer the questions posed by these Petitioners. Indeed, the appendix to *Letter Carriers* clearly establishes that the activity at issue in this case squarely falls within the rule established by this nation's Little Hatch Act, which was then followed by each of the fifty states. At paragraph 12 of the appendix in *Letter Carriers* is found the following rule:

> 12. Activity by Indirection: Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are therefore accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation. *Letter Carriers, supra*, 413 U.S. at 581-82.

Rule 12 noted above is borne of an understanding of political realities. Obviously, if one method of accomplishing political activity is prohibited, while another is allowed, then

everyone would simply follow the allowed method. In other words, if acting alone is prohibited, but acting together in groups is permitted, then everyone will act in groups. This is all the more true since political activity accomplished in groups is always more effective than political activity by one acting alone.[5]

In closing, Petitioners are challenging settled Constitutional law. They, *as law enforcement officers*, chose to break the law, and now are seeking to contort and twist the applicable rule beyond all reason and common sense to find some way to accomplish that which the law clearly prohibits. It is prayed that this Honorable Court will not find any reason to challenge the reasonable and proper holdings of the Courts below.

2. Is this Court to Overrule Itself?

In *Letter Carriers*, this Honorable Court ruled that "Hatch Act" restrictions were "essential" to the functioning of American government:

> Such a decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, in that the political influence of federal employees on others and on the electoral process should be limited. *Letter Carriers, supra*, 413 U.S. at 557.

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5. This raises a troubling practical issue. Louisiana's Constitution is on the line here. Petitioners seek a ruling that any two or more persons acting in a group may legally violate the rule of Louisiana's Constitution. As it is beyond obvious that virtually every violation of the rule would always occur with two or more persons acting in concert, agreeing with the Petitioners' contentions here would render this portion of Louisiana's Constitution for all intents and purposes, a dead letter. Also, such would have been accomplished without any input from Louisiana's Attorney General since the five Petitioners contended in the Court below that they were not contesting the constitutionality of the rule.

On the same date *Letter Carriers* was announced, this Honorable Court decided the companion decision of *Broadrick v. Oklahoma, supra*, which regarded the same type restrictions as enacted by the various states.[6] In *Broadrick*, this Honorable Court began its review of one of the states' "Little Hatch Acts" as follows:

> Section 818 was enacted in 1959 when the state first established its Merit System of Personnel Administration. The section serves roughly the same function as the analogous provisions of the other forty-nine states, and is patterned on §9(a) of the Hatch Act. **Without question, a broad range of political activities and conduct is prescribed by the section.** (emphasis added) *Broadrick, supra*, 413 U.S. at 603.

In *Broadrick*, the issue presented to this Court was whether the language of the state's Little Hatch Act was "unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that may be prescribed and conduct that must be permitted." *Id.*, at 2913. In response, this Honorable Court held that:

> We have held today that the Hatch Act is not impermissibly vague. [case cited omitted] We have little doubt that §818 is similarly not so vague that "men of common intelligence must necessarily guess at its meaning." *Id.*, at 607.

This Court then continued by holding:

> Whatever other problems there are with §818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it prescribes or fails to set out "explicit standards" for those who must apply it. *Id.*, at 607.

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6. Following the enactment of the federal Hatch Act, *each* of the fifty states enacted their own "Little Hatch Acts." La.R.S. 33:2504 was originally enacted as Act 102 of 1944.

Louisiana's Little Hatch Act cannot be distinguished in any material way from the Oklahoma statute at issue in *Broadrick*. Notably, nowhere in the Petition for Writ of Certiorari have the Petitioners at bar contended that Louisiana's legislation bears any material difference from that approved in *Broadrick*. Indeed, based upon *Broadrick* and *Letter Carriers*, Petitioners at bar concede the constitutionality of the Louisiana rule. (Petition at pp. 7 and 20, footnote 1a)

It is indeed the rare case that this Honorable Court reverses itself. As was recently indicated by this Court in *Dickerson v. U.S.*, __ U.S. __, 120 S. Ct. 2326 (2000) the principles of *stare decisis* "weigh heavily" against overruling this Honorable Court's Constitutional decisions. *Id.*, at 2336. Both *Broadrick* and *Letter Carriers* are currently the settled rule in this country and in the fifty states. Petitioners have come nowhere near establishing a basis for overturning those settled Constitutional principles now.

3. No Conflict Exists

Petitioners' principle argument to this Honorable Court is that the U.S. Fifth Circuit's decision at bar is in conflict with the decision of the U.S. Second Circuit in *Biller v. U.S. Merit System Protection Board*, 863 F.2d 1079 (2nd Cir. 1988), and with the decision of the U.S. Eleventh Circuit in *Blaylock v. U.S. Merit System Protection Board*, 851 F.2d 1348 (11th Cir. 1988). With all respect, this argument borders on the frivolous.

In both *Biller* and *Blaylock*, the plaintiffs were contending that they did not violate the statute *at all*. Mr. Biller and Mr. Blaylock were not contending that the capacity in which they had acted (a/k/a the hat they were wearing at the time) was determinative of whether or not they had violated the rule. Quite to the contrary, the argument made by Mr. Biller and Mr. Blaylock was that they had done nothing beyond expressing their own opinions about political subjects and candidates, *and had gone no farther*. The *Biller* and *Blaylock* Courts agreed.

In contrast, your Petitioners at bar have *never* contended that their conduct would not violate the applicable rule if they had committed it acting alone. Instead, they make an argument which is unconsidered in the *Biller* and *Blaylock* cases, that being that the capacity in which they acted is somehow relevant and actually controlling.

Respondents respectfully submit that when this Honorable Court compares the contentions of the Petitioners at bar to the questions resolved in *Biller* and *Blaylock*, this Honorable Court will see that *Biller* and *Blaylock* have nothing whatsoever to do with the instant controversy. As was held by the U.S. Fifth Circuit at bar, the instant controversy is governed by this Honorable Court's decisions in *Broadrick* and *Letter Carriers*, and by the U.S. Fifth Circuit's decision in *Wachsman v. City of Dallas*, 704 F.2d 160 (5th Cir. 1983).

Similarly, please note that Petitioners at bar are also contending that the U.S. Fifth Circuit panel applied the wrong line of U.S. Fifth Circuit caselaw. They contend that instead of *Wachsman*, the Fifth Circuit panel should have based its decision upon the U.S. Fifth Circuit's decisions in *Boddie v. Columbia*, 989 F.2d 745 (5th Cir. 1993) and *Brady v. Fort Bend County, Co.*, 58 F.2d 173 (5th Cir. 1995). However, this Court respectfully must presume that the U.S. Fifth Circuit is well familiar with its own jurisprudence. The Petitioners at bar repeatedly raised the same case cites to the U.S. Fifth Circuit judges, who duly considered each of them. The U.S. Fifth Circuit, having reviewed the U.S. Supreme Court precedents, as well as *Wachsman*, *Boddie* and *Brady*, determined that *Letter Carriers* and *Wachsman* controlled. Accordingly, this Honorable Court is *not* faced with a split in the circuits, and, it is *not* faced with one circuit misapplying its own prior precedents.

4. Federal Statutory Law Has No Bearing

While the contention is scarcely briefed (if at all), there is an implicit contention in the Petition that changes in federal statutory law have some bearing on this matter. Implicitly at

least, Petitioners are contending that since the U.S. Congress has changed the federal Hatch Act restrictions, that somehow this changes the *Constitutional* rule. In reply, Respondents submit the following two points:

First, this Honorable Court in *Dickerson, supra*, flatly rejected the notion that Congress can change, through statutory law, the Constitutional rules established by this Court. As held in *Dickerson*, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution." *Dickerson, supra*, 120 S. Ct. at 2332. Plainly, this Court's decisions in *Broadrick* and *Letter Carriers* announced a Constitutional rule. As such, changes by the U.S. Congress to its federal Hatch Act restrictions do not change the Constitutional rules announced in *Letter Carriers* and *Broadrick*.

Second, Respondents question whether the new federal legislation would allow all of the conduct which occurred in the matter at bar. Even the Petitioners have not contended to this Court that the new federal legislation would allow them to have engaged in all of the different actions which are at issue in this case. However, even if that were to be established, such would not be determinative because of the following point of law:

Louisiana enacted a new Constitution in 1974. This was shortly after this Honorable Court's decisions in *Broadrick* and *Letter Carriers* in 1973. Thus, upon the blessing given by this Honorable Court to Hatch Act restrictions in 1973, the people of the State of Louisiana decided in 1974 to retain those Hatch Act restrictions within their new and streamlined Constitution, when so many other provisions were being removed from what had become an enormous and unwieldy constitutional document. Thus, the judgment of the people of Louisiana on the exact subject at bar, which followed two holdings on the precise Constitutional rule from this Honorable Court just one year earlier, cannot be seen as having been repudiated by

subsequent federal statutory enactments intended by the Congress to cover *only* federal employees.

5. Changes in Other States Were Not Raised Below, and Are Immaterial

In the context of these proceedings, the Supreme Court of the United States is not a trial court. Despite this, the bottom of page 13 of the Petition for Writ of Certiorari premises itself upon heresay conversations between Petitioners' attorney and several witnesses. Obviously, Respondents OBJECT to such indefensible tactics on grounds of heresay, on grounds that nothing as to how other states conduct themselves was submitted to or passed upon by the Courts below, upon grounds of materiality and relevance, and upon grounds that nothing concerning the State of Oklahoma's practices in the record of the courts below.

From the perspective of the Respondents, this Honorable Court announced a Constitutional rule in *Broadrick* and *Letter Carriers*. As such, as long as Louisiana stays within that Constitutional rule, it need not be concerned with how other states choose to conduct their affairs on these matters. Once the Petitioners conceded that the Louisiana rule was Constitutional, all arguments concerning how other states conduct themselves (which are being raised to this Court in the first instance) became irrelevant and immaterial to any issue.

6. This Court *Required* the Fifth Circuit to Decide the Constitutional Question

Part Two of the Reasons for granting the Petition submitted by Petitioners complains that, "The Fifth Circuit displayed an unusual lack of caution in going directly to the issue of constitutionality . . ." (Petition, p. 15) This argument is borne of the drafter of the Petition's failure to understand that this case was originally filed by the Petitioners as an action arising

under 42 U.S.C. § 1983.[7] In addition, the counsel who drafted the Petition failed to consider that the original Petitioners sued Chief of Police Nick Congemi individually, thus raising the question of qualified immunity, *and* sued the City of Kenner, thus raising questions under *Monell v. Dept. of Social Svs. of the City of New York*, 436 U.S. 658 (1978). In the District Court, it was the claim of the five employees that Chief Congemi's decision to terminate them somehow violated the Constitution of the United States. Because of the claims presented, the lower courts were directly faced with a claim of unconstitutional activity taken under color of law.[8]

In actions arising under 42 U.S.C. § 1983 where the plaintiff *chooses* to sue an individual public official, and that public official then raises the issue of qualified immunity, this Honorable Court's precedents have repeatedly held that the first issue to be decided by the Court is the question of whether a Constitutional violation exists at all. *See Graham v. Connor*, 490 U.S. 386 (1989); and *Siegert v. Gilley*, 500 U.S. 226, 231-235 (1991). Thus, as per this Court's prior precedents, the U.S. Fifth Circuit in this matter properly avoided reaching a complex qualified immunity analysis by first determining whether the conduct put at issue by the Plaintiffs, if proven true, would state "a violation of a Constitutional right at all." *Id.*

Moreover, by deciding the Constitutional question first, rather than pretermitting it, the lower Courts were able to avoid a complex *Monell* argument. This is because under this

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7. Clearly, that which was ruled upon by the district judge was an action brought pursuant to 42 U.S.C. § 1983. *See West, supra,* 28 F. Supp.2d at 390.

8. If a claim of a constitutional violation was not presented, what was the basis of jurisdiction in the Court below? Similarly, if this Court faces nothing other than an issue of proper application of state law, what is its jurisdiction? In reviewing the Petitioners' many contorted arguments, this Honorable Court might find that they have argued themselves right out of this Honorable Court's jurisdiction.

Honorable Court's holding of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), there can be no liability of a municipality under 42 U.S.C. § 1983 if there is no Constitutional violation by the officer at issue.

Notably, even if the Fifth Circuit had pretermitted the Constitutional violation issue, and proceeded directly to qualified immunity (vis-a-vis Chief Congemi individually), no possible claim could be stated against Nick Congemi for two reasons. First, since Plaintiffs' federal claims are premised *by them* upon the *Pickering*[9] balancing test, it is logically *impossible* for them to establish that the violation at issue here qualifies as a violation of a previously existing "clearly established" right in the "particularized" sense required by *Anderson v. Creighton*, 483 U.S. 632 (1986). In this regard, please see *Moran v. State of Washington*, 147 F.3d 839 (9th Cir. 1998) wherein the Ninth Circuit cited cases on this exact point from virtually every circuit in the country, and stated, "We join the chorus of voices from other circuits that have specifically observed the difficulty of finding clearly established law under *Pickering*." *Id.*, at 847[10]

Second, Nick Congemi (the individual) is not the employees' employer. The City of Kenner is their employer. Thus, while they certainly would have a right of action to sue Nick Congemi (the individual) for money damages for acts taken under color of law which they could show violated their *clearly* established constitutional rights, they cannot otherwise obtain relief from him as an individual.

No claim against the City of Kenner under § 1983 has been stated either. In this particular § 1983 action, the policy at issue is not the policy of the municipality, but rather of the state. In

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9. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

10. In addition, the district judge squarely held that qualified immunity applied even if a Constitutional violation had been stated. *West, supra*, 28 F. Supp.2d at 394. This alternative holding has *not* been challenged in the Petition.

Monell, supra, this Honorable Court authorized actions against municipalities for Constitutional violations caused by a policy *of the municipality. See e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

At bar, there is absolutely no *municipal* policy at issue. The only "policy" is that promulgated by the State of Louisiana through it Constitution and statutes. In this regard, please review the following passage from the district court's opinion at bar which has not been assailed in any way by the Petitioners to this Court:

> The Fifth Circuit has long recognized that simply following the mandatory dictates of state law cannot form a predicate for *Monell* liability. This point was explained in *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988), when the Fifth Circuit stated that a county official's "deliberate or mistaken departure from controlling law" cannot be said to represent county policy. See also *Bethesda Lutheran Homes and Svcs., Inc. v. Leean*, 154 F.3d 716, 718-719 (7th Cir. 1998) ("but the state of mind of local officials who enforce or comply with state or federal regulations is immaterial to whether the local government is violating the Constitution if the local officials could not act otherwise without violating state or federal law. The spirit, the mindset, the joy or grief of local officials has no consequences for the plaintiffs if these officials have no discretion that they could exercise in the plaintiffs' favor. '[M]unicipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives.' ") (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (plurality of opinion)) (other citation omitted). *West, supra*, 28 F.Supp.2d at 394-95

In sum as to this contention of the Petitioners, the U.S. Fifth Circuit did exactly what it was supposed to do by looking directly to the Constitutional issue. *Siegert, supra.* However, and in any event, the Petitioners would still have lost against Chief Congemi since he was not *personally* their employer and was entitled to qualified immunity, and, since the City of Kenner could not be successfully sued under 42 U.S.C. § 1983 for doing nothing other than enforcing a Constitutional *state* policy.[11]

7. Injunctive Relief is Not Available

Before the Petitioners respond to the above-stated caselaw on qualified immunity with a supplemental brief that such does not apply to injunctive claims, Respondents submit that injunctive relief is not available in this case as per this Honorable Court's prior precedents.

First, in *Tower v. Glover*, 467 U.S. 914 (1984) this Honorable Court determined that, "A defendant in a civil or administrative enforcement proceeding may not enjoin or sidetrack that proceeding by resorting to a § 1983 action in federal court." *Id.*, at 2826. That is exactly what has been *attempted* at bar. The instant lawsuit was filed in response to Chief Congemi's notification of each of the five employees of the scheduling of a pre-termination hearing. The district judge refused to rule upon the claim for injunctive relief until after Chief Congemi had actually decided whether the employees were to be terminated or not. After Chief Congemi did in fact terminate the employees, the U.S. district judge refused to grant injunctive relief. Thereafter, the matter proceeded (as it should have) before the City of Kenner Municipal Fire and Police Civil Service Board. That body has now ruled *on the merits* that Chief Congemi acted in good faith and for legal cause.[12]

11. Violations of state law cannot form the predicate of liability under 42 U.S.C. §1983. *Elder v. Holloway*, 510 U.S. 510, 515-16 (1994).

12. Despite this fact finding, Petitioners clearly desire that this Court examine the question of Chief Congemi's subjective motivations (Cont'd)

(Attachment 1) At present, a Louisiana state appellate court is reviewing that decision in the light of Louisiana state law. Clearly, the Petitioners' dearest hope is that this Honorable Court will "enjoin and sidetrack" that state proceeding by somehow enjoining Louisiana's application and interpretation of its own laws.

Respondents submit that this Court's prior precedents clearly establish that if the Petitioners at bar cannot show a basis for monetary liability, that they have no other viable claim to present a federal court. In that regard, this Court announced the following rule in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983):

> Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional. *Id.*, at 111.

At no time in the instant cause have the Petitioners claimed that they are in danger of being terminated *again*. As such, unless they have presented this Court a claim of monetary liability which can surpass all of the precedent noted above, there is no reason for this federal action to continue further. It should be allowed to run its course in the appellate system of the State of Louisiana, without any further involvement of the federal courts.

8. *Pickering* Balancing Would Not Lead to a Different Outcome

Respondents also respectfully submit that (1) the *Pickering* balancing test is not reached in this matter, and (2) even if it is reached, that application of that test to these circumstances leads to the exact same outcome.

(Cont'd)
as if this Court were a trial court, and, as if the fact findings of the Civil Service Board had never occurred.

First, it is important to note that the Petitioners have conceded the Constitutionality of the Louisiana Rule. They have thus conceded, as they must given *Broadrick* and *Letter Carriers*, that this particular rule is "essential" to the functioning of government. Given these concessions, they have no cause to argue in federal court that application of the rule to them is somehow prohibited as a violation of *their* Constitutional rights, just because they violated the rule in "association" with others. With respect, their argument is illogical.[13] (One does not obtain a magic talisman with which to violate the law merely by violating the law while wearing a union hat.)

Second, even if a *Pickering* balancing test is conducted (which was not actually done within the Petition for Writ of Certiorari), no different outcome would result. The matter at bar is far different from the situations in *Biller* and *Blaylock*. In those actions, the election contest at issue was that of the President and Vice-President of the United States. At bar, we are dealing with active participation by civil service police officers in an election contest for a person who would sit upon the city council of the municipality which they serve. The close connections at bar are obviously very different from those involved in a national Presidential contest.

How likely is it that an individual employee's job might be effected by who becomes the president? In contrast, a city councilman has direct influence over the overall police budget, and can at the very least strongly influence municipal policy vis-a-vis the police department. Clearly, the actions at bar portend the politicalization of the police department, a reality clearly sought to be avoided by the rule at issue.

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13. A permissible construction of the five former employees' argument is that *they* are attempting to assert *PACK's* rights. However, their argument is also that PACK is a separate corporate entity, and this Court has squarely held that persons have no standing to allege the infringement of the Constitutional rights of third parties. *Conn v. Gabert*, 526 U.S. 286, 293 (1999).

Also, if it is permissible for civil service employees to associate in groups to violate the rule collectively, then clearly we will immediately see competing groups of associations actively soliciting the allegiance of different groups of civil service employees. Wherever such an association forms which is anti-administration, another group will form which is pro-administration. While the label "civil service" will remain in place, all of the problems civil service was designed to avoid will have quickly reentered municipal government service.

Accordingly, the *Pickering* balancing at bar involves great weight being given to the fact that (1) the election campaign at bar was for a municipal city council seat rather than for the United States President, and (2) allowing one group of employees to form an association to violate the law to advance their political agenda, clearly requires that all opposing candidates be allowed to be supported by groups of civil service workers doing the exact same thing. If we go down that road, we would do better to simply repeal civil service all together.

All of these competing interests and considerations were reviewed in detail by this Honorable Court in both *Broadrick* and *Letter Carriers*. In light of the passage in *Letter Carriers* which founded all analysis in that matter upon the "judgment of history," it is prayed that this Honorable Court will see that in any balancing of the applicable interests here, the continuing vitality of Louisiana's Little Hatch Act is "essential" to the functioning of its governmental units. *See Letter Carriers, supra*, 413 U.S. at 557.

9. The Board is Not the Board

In proceedings of this matter before the district court and the appellate court, the City of Kenner and its police chief did *not* premise their Motion for Summary Judgment in any way upon the disputed factual issues of (a) whether the organization known as Police Association City of Kenner (PACK) did actually exist as a corporate entity, and, that the five named employees were indeed the Executive Board of PACK. The reason for this

is that Respondents have always contended that it matters not what hat an employee is wearing at the time the law is violated. Based upon *Letter Carriers* and *Wachsman*, "activity by indirection" is nevertheless a violation.

However, in light of this Honorable Court's Rule 15.2, Respondents respectfully apprise the Court that significant factual issues do exist as to whether PACK exists at all. The required annual filing to keep a corporation in existence in Louisiana had not been filed for "PACK" for *many* years. Moreover, the five persons who claim to this Court to be the PACK Executive Board were not elected to those offices. The purported Articles of Incorporation of PACK mandate elections occurring on the 15th of May. However, facts developed during the civil service hearings established conclusively that these five persons decided in the month of February to simply place themselves in the offices, and to not hold any elections whatsoever. Beyond any doubt whatsoever, they are *not* the Executive Board of PACK, even if PACK exists. Also, it has been learned that "PACK" had not had *any* meetings of its membership for several *years* prior to the events at issue in this case. Finally, two of the five Petitioners swore in an unrelated proceeding that PACK is *not* a union.

Again, Respondents note that they did not defend this case in the Courts below based upon a factual dispute over whether PACK exists, or over whether these five persons may properly call themselves the Executive Board of PACK. (That legal dispute was never made "material" to the Rule 56 motion the Defendants presented the district judge.) Respondents find nothing in Louisiana's Constitution or in its statutes that give them any basis for ignoring the direct command of the law when faced with an employee giving as his or her excuse, "*I did it for the Union.*" Regardless of how, or why, or for whom the violation was committed, the fact remains that the employee "*did it.*" As such, and as was held by the district court and by the appellate court, a Louisiana law (which the Petitioners concede is Constitutional) was violated by these employees' conduct.

CONCLUSION

Following the lead of the U.S. Congress, Louisiana enacted Hatch Act legislation in 1944. Following the lead of this Honorable Court in its 1973 holdings in *Broadrick* and *Letter Carriers*, the people of Louisiana decided to keep their Hatch Act restrictions in their Constitution in 1974. Now, one particular special interest group seeks to use the federal court system and the government of the United States to effectively repeal a Louisiana Constitutional provision and statutory article. Respondents, having established that they did nothing other than respect the command of Louisiana's law, as found by the City of Kenner Civil Service Board, a judge of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, a U.S. District Judge and by a three judge panel of the U.S. Fifth Circuit Court of Appeals, respectfully ask of this Honorable Court, that the Petition for Writ of Certiorari be DENIED.

Respectfully submitted,

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Attorneys for Respondents

APPENDIX

ATTACHMENT 1 — EXCERPT, CIVIL SERVICE BOARD MEETING, JUNE 24, 1999

CITY OF KENNER

KENNER MUNICIPAL FIRE & POLICE

CIVIL SERVICE BOARD

Civil Service Board Meeting
June 24, 1999
1801 Williams Boulevard
Kenner, Louisiana 70062

* * * * *

EXCERPT

* * * * *

Board Members:

MR. FRANK SIMONCIONI, Chairman
MR. JEROME VOLK, JR.
MR. MICHAEL VOLTOLINA
MR. RONALD J. LABARRIERE
MR. GREGORY GREMILLION, Board Attorney

Representing the Appointing Authority:

MR. PHILIP J. BOUDOUSQUÉ
MR. JERRY NIELSEN

Attachment 1

Representing Officers Jaume, Lynch, Polito, West and Verrette:

MR. KEITH R. CREDO

Reported by: Cindi Jukes and
Certified Court Reporter
State of Louisiana

PROCEEDINGS

MR. SIMONCIONI:

Okay. I'm going to make this motion, finding that the Appointing Authority acted in good faith and for cause in the termination of the five subject police officers in this hearing.

Specifically, we find that the five officers, both indirectly and directly, caused a $300 contribution to the Stagni campaign in violation of LA R.S. 33:2504(3). We further find that the members of PACK were not made aware by the five board members that the contribution had been made at the time of the contribution.

Secondly, we find that the actual political endorsement letter to the Stagni campaign for election signed by these five individuals directly and indirectly violated Louisiana Constitution Article X, Section 9, by supporting the election of a candidate for political office, and violated LA R.S. 33:2504(4)(e) by taking part in the political campaign of a candidate for public office by endorsing the candidate, which

is also a violation of Subsection A.4(d), as said endorsement is a public, political statement of a candidate seeking to be elected to public office.

We further find that the five policemen did not operate the organization as a factional, political club or organization. The Board finds theses violations were not done willfully as set forth in R.S. 33:2507. We find that termination is inappropriate. The penalty should be time lost from the date of termination and throughout the pendency of these proceedings until there is a higher court interpretation of the penalties for a non-willful violation set out in R.S. 33:2504C and 2507.

In addition, there shall be no award of lost seniority or back pay or any other benefits lost or financial reward. It is our finding that the two penalty statutes are ambiguous and in conflict with each other.

I need a second.

MR. VOLK:

I'll second.

MR. SIMONCIONI:

All in favor?

THE BOARD:

Aye.

Attachment 1

MR. SIMONCIONI:

All against?

MR. VOLTOLINA:

Nay.

MR. SIMONCIONI:

I'd like to read the minority opinion. Mike Voltolina voted "nay," and his vote that these five men, policemen, did not willfully violate any of these laws. It further states that the statute itself LA R.S. 33:2501 does not prohibit a union from endorsing a candidate for public office.

MR. GREMILLION:

That's 04.

MR. SIMONCIONI:

Sorry?

MR. GREMILLION:

2504 rather than 01.

MR. SIMONCIONI:

Okay. 2504 does not prohibit a union from endorsing a candidate for public office. These five individuals have

proven they have made every attempt, including seeking and receiving a written attorney's opinion and an oral opinion from another attorney, that the Cannatella decision is controlling law. The penalty is excessive for the circumstances of this case. That's the minority opinion.

MR. VOLK:

Mr. Chairman, I would also like to add my own opinion to the opinion that I previously seconded and the minority opinion. That I will like to add that these cases are factually intensive and the facts are controlling, and that the facts as set out in the Cannatella decision, wherein those facts were jointly stipulated to by all parties.

In this case, the facts were not stipulated to by any of the parties and were in fact hotly contested by all parties involved herein.

MR. GREMILLION:

Is there anything further to Mr. Voltolina's part of the opinion or that's it?

MR. VOLTOLINA:

Pretty much.

MR. GREMILLION:

Y'all need to go ahead and vote on that.

Attachment 1

MR. SIMONCIONI:

We already voted on it.

MR. GREMILLION:

Okay. The only other mention is what I understand that the board members found that the Chief acted in good faith and for cause in the termination. But because the penalty statute is ambiguous between 2504 and 2507, basically finding that the penalty, because it's ambiguous and it wasn't willful, that the termination was improper; is that correct?

MR. SIMONCIONI:

Yes.

MR. CREDO:

Can I ask does that mean that they get their jobs back with no lost time?

MR. VOLK:

No. It's pending the proceedings. We know you guys are taking it up and we don't know — the statute itself is so ambiguous, it doesn't tell you what you can do when there's no willful violation.

MR. SIMONCIONI:

Okay, that's it. Thank you.

(End of proceedings.)

Attachment 1

CERTIFICATE

I, Cindi Jukes, Certified Court Reporter, in and for the State of Louisiana, do hereby certify that the foregoing pages of proceedings were reported by me in stenotype and transcribed by me or under my personal direction and supervision, and are a true and correct transcript, to the best of my ability and understanding;

That I am not of counsel, not related to counsel, nor to the parties hereto, and am in no way interested in the outcome of this event.

/s/ Cindi Jukes
Cindi Jukes, CCR
Certified Court Reporter
State of Louisiana
Certificate No. 91356

ATTACHMENT 2 — JUDGMENT AND REASONS OF THE 24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, DATED AND FILED FEBRUARY 29, 2000

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON
STATE OF LOUISIANA

NUMBER: 541-272c/w541-993 DIVISION "F"

CITY OF KENNER POLICE DEPARTMENT

VERSUS

KENNER MUNICIPAL FIRE AND POLICE
CIVIL SERVICE BOARD

FILED: FEBRUARY 29, 2000 /s/ Herbert W. Anderson
DEPUTY CLERK

JUDGMENT

This matter came before the Court on an appeal from a ruling from the Kenner Municipal Fire and Police Civil Service Board.

Upon giving due consideration to the law and evidence, and in accordance with the Reasons for Judgment signed this date.

IT IS ORDERED, ADJUDGED, AND DECREED that the decision by the Kenner Municipal Fire and Police Civil Service Board finding the appellants in violation of La.R.S. 33:2504 be affirmed.

Attachment 2

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the decision by the Kenner Municipal Fire and Police Civil Service Board reinstating appellants be reversed.

Judgment read, rendered, and signed this 29th day of February, 2000.

/s/ Patrick J. McCabe
JUDGE

Attachment 2

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON
STATE OF LOUISIANA

NUMBER: 541-272c/w541-993 DIVISION "F"

CITY OF KENNER POLICE DEPARTMENT

VERSUS

KENNER MUNICIPAL FIRE AND POLICE
CIVIL SERVICE BOARD

FILED: FEBRUARY 29, 2000 /s/ Herbert W. Anderson
DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came before the Court on an appeal from a ruling from the Kenner Municipal Fire and Police Civil Service Board.

Five Kenner City Police officers who were members of the Classified Civil Service were terminated for violations of La.R.S. 33:2504 which prohibits political activity by civil service employees. The police officers were also members of the Police Association of Kenner (PACK) and comprised its executive board.

On June 25, 1998 each of the former employees filed a Petitions for Appeal with the Kenner Municipal Fire and Police Civil Service Board. After conducting hearings, the

Attachment 2

Board rendered a decision. The Board concluded that each employee had violated La.R.S. 33:2504 and that Chief Nick Congemi acted in good faith and for legal cause in ordering that they be terminated. However, the Board determined that an ambiguity existed between La.R.S. 33:2504 and 2507 and elected to change the severity of the penalty imposed. Consequently, the Board ordered that the employees be reinstated. From this ruling, both the employees and the City of Kenner as the Appointing Authority appeal.

The appellant police officers who were members of PACK were approached by Joseph Stagni, candidate for Councilman-at-Large for City of Kenner concerning an endorsement. A letter personally signed by the appellants announcing the decision to support Stagni was sent to the PACK membership. Appellants then made the decision that Stagni should receive the endorsement and a $300 financial contribution to his campaign. Subsequently, Chief Nick Congemi conducted a formal investigation for possible violations of La.R.S. 33:2504. As a result of the investigation, Chief Congemi notified each of the officers of a pre-termination hearing on June 4, 1998. Appellants were terminated June 15, 1998.

Appellants then sought an appeal with the Kenner Civil Service Board and injunctive relief in the United States District Court. The federal court denied summary judgment on the civil rights claims finding that the employees had violated the provisions prohibiting political activity. Jurisdiction over pending state law claims was denied.

The Civil Service Board, after conducting hearings, then concluded that the five officers both indirectly and directly

violated statutes prohibiting political activity by civil service employees. Specifically, the Board found that the $300 campaign contribution was a violation of La.R.S. 33:2504(3). In addition, the actual political endorsement was a violation of Louisiana Constitutional Article X, Section 9 and La.R.S. 33:2504(e) by supporting a candidate for public office and participating in the candidate's campaign. The Board also found that termination was inappropriate and ordered the employees reinstated.

The standard of review in civil service cases is whether the action of the board was arbitrary and capricious. Great weight should be given to the factual determination of the board. The board's findings should not be reversed unless clearly wrong or manifestly erroneous. Legal cause exists when there is a factual determination that certain behavior occurred. **Marcantel v. DOTD**, 590 So.2d 1253 (La.App.1st Cir. 1991).

The present case was reviewed by the United States District Court in **West v. Congemi**, 28 F.3d 385 (E.D. La. 1998) and appellants were found to be in violation of the statutes. The court found that the endorsement and campaign contribution amounted to at least indirect political activity and properly fell within the ambits of La.R.S. 33:2504 which prohibits political activity undertaken either directly or indirectly. Therefore, Chief Congemi properly complied with the statute which mandates termination.

Considering the particular facts of the case, the findings made by the federal court on the same set of facts and applying the appropriate standard of review, the Court finds

that the Board's actions were neither arbitrary nor capricious. The Board had legal cause for its findings. Appellants controlled PACK and did in fact violate the provisions of La.R.S. 33:2504. Political activity undertaken either directly or indirectly is specifically proscribed under the statute. The endorsement of Stagni and contribution to his campaign amounted to political activity prohibited by La.R.S. 33:2504. Therefore, the Board's actions in finding a violation of the statute should be upheld.

However, the Court also finds that La.R.S. 33:2504 mandates that the penalty for violation is termination. There is not any conflict between La.R.S. 33:2504 and 33:2507. La.R.S. 33:2504 specifically provides the penalty for violation of the provisions of the statute. The Board's finding is not factual but rather a legal determination and it did not have discretion under the statutes to decide whether a lesser penalty was more appropriate. The language of the statute is mandatory and clearly states "that the appointing authority shall discharge from the service any employee whom he deems guilty of violating any one or more of the provisions of this Section." Therefore the Court concludes that the penalty levied by the Board should be overturned. The appropriate penalty is termination.

SIGNED this 29th day of February, 2000, Gretna, Louisiana.

/s/ Patrick J. McCabe
JUDGE